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No. 89-870

In the Supreme Court of the United States

OCTOBER TERM, 1989

KIESEL COMPANY, INC., PETITIONER

v.

KIMBERLY HOUSEHOLDER, SPECIAL AGENT, FEDERAL BUREAU OF INVESTIGATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was entitled to the pre-indictment return and exclusion of records seized by federal law enforcement agents in objective good faith pursuant to a search warrant issued by a federal district judge.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 879 F.2d 385. The opinion of the district court (Pet. App. A16-A23) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 1989, and a petition for rehearing was denied on September 7, 1989. The petition for a writ of certiorari was filed on November 22, 1989. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This action was brought by petitioner Kiesel Company to quash a search warrant issued by a federal district judge, to compel return of the records seized, and to exclude evidence obtained pursuant to the warrant from use in any future proceedings. Petitioner brought this action before any indictment was returned. The district court granted petitioner relief, but the court of appeals reversed. As of this date, no charges have been filed against petitioner.

1. The warrant for the search of petitioner's business premises was based on an extensive affidavit of respondent, a special agent of the Federal Bureau of Investigation, setting out alleged criminal violations of a variety of federal environmental statutes and the mail fraud statute by petitioner in the conduct of its used oil and hazardous waste operations.[1] As the court of appeals explained, "[t]he affidavit described numerous occasions of mixing waste oil contaminated with PCB with pure oil for resale and indicated that there was a wide pattern of such conduct," and it "contained charges that not only had tanks containing contaminated oil leaked on the premises, but that sludge from cleanup activities was buried on the premises." Pet. App. A6. The warrant was issued by District Judge Limbaugh and was executed by agents of the FBI and the Environmental Protection Agency on February 29, 1988. *Id.* at A2-A3, A6, A9.[2]

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[1] The warrant is reproduced at Pet. App. A24-A29.

[2] It is disputed whether the affidavit was present at petitioner's premises at the time of the search. Pet. App. A9, A21.

2. After the search, petitioner filed a motion pursuant to Fed. R. Crim. P. 41(e) to quash the warrant and for return of the property and related relief. That motion was heard by a different judge, District Judge Filippine.

The district court declined to exercise jurisdiction under Rule 41(e) and instead treated the motion as an independent action under its "anomalous" or equitable jurisdiction. Pet. App. A22.[3] The court rejected the government's argument that equitable jurisdiction to compel the pre-indictment return of property should be exercised only in exceptional cases, where it is shown that: (1) a government agent proceeded in callous disregard of the Fourth Amendment, (2) the movant would be irreparably injured if relief is not granted, and (3) the movant has no adequate remedy at law. *Id.* at A17, citing *Pieper* v. *United States*, 604 F.2d 1131 (8th Cir. 1979). Turning to the merits, the court concluded that the warrant was too broadly written and therefore violated the Fourth Amendment. The court quashed the warrant and ordered respondent to return the property seized. Pet. App. A14-A23. The court also "enjoin[ed] any federal agent from using in any proceeding information derived from the records or property while in the possession of the government agents pursuant to seizure under this search warrant," albeit without prejudice to the government's use of any evidence that might be properly obtained in the future. *Id.* at A22-A23. The court stayed the return of the property pending appeal. *Id.* at A23.

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[3] In the court of appeals, Judge McMillian attributed the term "anomalous jurisdiction" to the Fifth Circuit's decision in *Richey* v. *Smith*, 515 F.2d 1239, 1243 (1975). See Pet. App. A10 n.2 (McMillian, J., dissenting).

3. The court of appeals reversed the judgment of the district court and remanded the case with instructions to dismiss, concluding that the district court had acted prematurely in granting equitable relief. Pet. App. A1-A10.

a. The court of appeals agreed with the district court that petitioner's application for relief should be treated as a suit in equity, rather than a motion under Fed. R. Crim. P. 41(e). But it found that the district court had erred in failing to consider the three factors, cited above, that bore on the propriety of exercising equitable jurisdiction to order the pre-indictment return and exclusion of property. Pet. App. A4-A5. After weighing those factors, the court of appeals held that the district court had abused its discretion in awarding relief.[4]

First, the court of appeals found that petitioner had failed to show that the government acted in callous disregard of petitioner's Fourth Amendment rights. The court noted that respondent's "lengthy and detailed" affidavit established probable cause by describing a "broad range of illegal activity," and that the affidavit was presented to a federal district judge, who approved the search. Pet. App. A6. In these circumstances, the court concluded that the federal officers acted in objective good faith, rather than in callous disregard of petitioner's rights, in instituting the search. *Ibid.*, citing *United States* v. *Leon*, 468 U.S. 897, 923-925 (1984). Furthermore, in light of the showing made in the unsealed affidavit, the court

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[4] The court ordered respondent's affidavit in support of the search warrant unsealed (with sensitive information redacted), and it allowed the parties to file supplemental briefs addressing the contents of the affidavit. Pet. App. A9.

found no "callous disregard in the methods utilized in the search." Pet. App. A6.

Second, the court of appeals held that petitioner had failed to establish that it would suffer irreparable injury if relief was not granted. The court noted that petitioner had not made any factual showing that the seizure of records had hampered its ability to conduct its business, noting that the government had made provision for petitioner to have reasonable access to the records. Pet. App. A6-A7. The court also rejected petitioner's contention that the possibility that a future indictment might be based in part on evidence that was seized in violation of the Fourth Amendment justified relief. In the court's view, to allow the mere possibility of indictment to constitute irreparable harm for these purposes would too readily bypass the normal means of challenging allegedly unconstitutional searches and seizures—namely, a motion to suppress the evidence in the prosecution itself—and would convert what should be an extraordinary equitable remedy, to be used with restraint, into a "quite ordinary" one. *Id.* at A7-A8.

Third, the court of appeals ruled that the availability of a motion to suppress would in any event furnish petitioner an adequate remedy at law to challenge the search if a prosecution was instituted. Pet. App. A8.

b. Because none of the three factors informing the exercise of equitable jurisdiction had been satisfied, the court of appeals held that the district court abused its equitable discretion in ordering return of the property and enjoining its future use, and the court disposed of the case on that ground. Pet. App. A8, A10. But before doing so, the court of appeals commented on the district court's evaluation of the

search on the merits. *Id.* at A8-A9. The court noted that despite the general principle that a magistrate's determination of probable cause should be paid great deference by reviewing courts, the district court in this case had "failed to give any deference whatsoever to the initial determination of probable cause, which was made by another district judge of the same district." *Id.* at A8. The court of appeals pointed out that in this case, "[t]he reasonableness of the search is a close question, and the initial determination should have been weighed into the balance." *Id.* at A8-A9.

The court of appeals also stated that if it were to reach the issue, it would determine that the district court erred in finding the warrant to be overbroad, because the alleged offenses that were the subject of the investigation permeated petitioner's used oil and hazardous waste business. The court explained (Pet. App. A9):

> The affidavit described a pervasive pattern, extending over a period of time, of the mixture of used contaminated oil with fresh oil, and either accidental or intentional contamination of the premises with such oil. We would conclude that the warrant and search were fully supported by our earlier decision in *United States* v. *Kail*, 804 F.2d 441 (1986). In our view, the affidavits describe circumstances permeating the entire business operation, as in *Kail*, so as to support a determination of probable cause that the operation was permeated with illegal conduct occurring over a period of several years. The records dealing with [petitioner's] used oil and hazardous waste operations, which was the limitation placed on the warrant, were properly seized.

Finally, the court of appeals stated that before granting relief, the district court should have made a factual finding on whether the affidavit was present at petitioner's premises at the time of the search. Such a finding, the court explained, "might have channeled this case into a substantially different pattern than that presented" (Pet. App. A9).[5]

ARGUMENT

The court of appeals correctly held that petitioner failed to make a sufficient showing to warrant an exercise by the district court of its extraordinary equitable power to order the pre-indictment return of property and to bar any future use of the evidence seized. The holding below that petitioner is not entitled to relief in the circumstances of this case does not conflict with any decision of this Court or of any other court of appeals, and it presents no question warranting review by this Court.

1. a. The controlling feature of this case, which petitioner does not even address, is that the federal agents acted in objective good faith in executing a facially valid search warrant. In these circumstances, even if the warrant was overbroad, the evidence seized is not subject to exclusion in a criminal prosecution, and the court of appeals was therefore correct in reversing the district court's judgment requiring pre-indictment return of the property and barring use of any evidence derived from the search and seizure in any proceeding. *United States* v. *Leon*, 468 U.S. at 922-925.

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[5] Judge McMillian dissented. He believed that Eighth Circuit precedent did not require application of the three-factor test for the exercise of equitable jurisdiction and that the search was unconstitutionally broad. Pet. App. A10-A13.

The holding of *Leon* is based on the propositions that the purpose of the exclusionary rule is to deter improper police conduct and that this purpose would not be served by excluding evidence seized by law enforcement agents who acted in objective good faith pursuant to a facially valid warrant. *Leon*, 468 U.S. at 905-925. These propositions are as valid in the context of pre-indictment motions for the return and suppression of evidence, such as that in the present case, as they are in the context of post-indictment motions. Accordingly, every court of appeals that has considered the question has held that the holding of *Leon* applies to pre-indictment motions where the evidence at issue was seized pursuant to a warrant. *United States* v. *Roberts*, 852 F.2d 671, 675 (2d Cir.), cert. denied, 109 S. Ct. 556 (1988); *Center Art Galleries-Hawaii, Inc.* v. *United States*, 875 F.2d 747, 751-752 (9th Cir. 1989); *Floyd* v. *United States*, 860 F.2d 999, 1005-1006 (10th Cir. 1988). Cf. *United States* v. *American Investors of Pittsburgh, Inc.*, 879 F.2d 1087, 1106-1107 (3d Cir. 1989), cert. denied, 110 S.Ct. 368, 721 (1989).

Moreover, following the decision by the court of appeals, Rule 41(e) was amended to delete the language stating that if the motion for return of property is granted, the property "shall not be admissible in evidence at any hearing or trial." The Advisory Committee Note on this amendment explains that the deleted language concerning admissibility of the evidence was "only confusing" because it had not "kept pace" with the development of exclusionary rule doctrine, citing in particular this Court's decision in *Leon*. 45 Crim. L. Rep. 3021 (1989). Indeed, the Advisory Committee Note states that even prior to the 1989 amendment, the federal courts, relying

upon *Leon* and other exclusionary rule decisions, had "permitted the government to retain and to use evidence as permitted by the fourth amendment." *Ibid.* Thus, the recent amendments to Rule 41(e) now confirm the soundness of the uniform rulings by the courts of appeals that a movant is not entitled to suppression of evidence under Rule 41(e) where this Court's exclusionary rule decisions do not so require.

Under *Leon*, suppression will not be ordered unless the judge who issued the search warrant "abandoned his detached and neutral role" or the law enforcement officers "were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause." *Leon*, 468 U.S. at 926. Only the last of these conditions is alleged here—that the agents executing the warrant could not reasonably have believed it to be valid. The court of appeals, however, not only found that the agents acted in objective good faith (Pet. App. A6), but also expressed the view, albeit in dictim, that the warrant was valid (*id.* at A8-A9). The law enforcement agents cannot be faulted for coming to the same conclusion. Accordingly, the court of appeals correctly held that petitioner failed to establish a basis for the district court to exercise its extraordinary equitable jurisdiction to compel the return of the property and the exclusion of its use in any proceeding. That is especially so in view of petitioner's further failure to show that it is hampered in the conduct of its business by the government's continued possession of the records that were seized.

b. Petitioner objects (Pet. 5-6) to the analysis applied by the court of appeals in denying relief, and contends that its ruling conflicts with the Tenth Cir-

cuit's decision in *Floyd* v. *United States*, 860 F.2d 1003 (1988). As petitioner concedes (Pet. 5-6), however, this Court has held that a movant must make a showing of irreparable injury to support a motion to suppress evidence under Rule 41(e), on equitable grounds, in advance of any proceedings. See *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 359-360 (1977), citing *Hunsucker* v. *Phinney*, 497 F.2d 29, 34 (5th Cir. 1974), cert. denied, 420 U.S. 927 (1975). And in *Floyd* v. *United States*, upon which petitioner principally relies, the Tenth Circuit likewise held that a showing of irreparable injury is required. 860 F.2d at 1005-1006.

Petitioner nevertheless asserts (Pet. 5) that the decision below conflicts with *Floyd* because the Tenth Circuit there held that a finding of irreparable harm was not precluded by the availability of a post-indictment motion to suppress. In fact, however, the Tenth Circuit in *Floyd* held that some showing of irreparable injury was required, and it then remanded for the district court to make that determination. In so doing, the Tenth Circuit specifically "express[ed] no opinion regarding this issue on remand," although it did offer some "guidance." That guidance consisted of nothing more than a rejection of the movant's argument that a violation of the Fourth Amendment is itself the sort of irreparable injury that warrants relief under Rule 41(e), since *Leon* permits use of evidence seized in good faith reliance on a warrant and since the purpose of the exclusionary rule is to deter unlawful police conduct, not to redress individual violations of the Fourth Amendment. 860 F.2d at 1005-1006. The Tenth Circuit stressed that "[i]nstead, irreparable harm refers to circumstances in which a Rule 41(e) movant can-

not wait for a legal remedy, thus justifying the court's equitable jurisdiction." *Id.* at 1006. Among the cases it cited for that point was the Eighth Circuit's decision in *Pieper* v. *United States*, 604 F.2d 1131, 1134 (1979), which it described as supporting the following proposition: "irreparable harm * * * if criminal indictment based on * * * illegally seized evidence appears imminent." But the Tenth Circuit in *Floyd* did not actually hold that irreparable harm would be established in that situation, since it earlier had made clear that it was not taking a position on the issue of irreparable harm, which was to be resolved on remand.[6]

Moreover, in *Floyd*, the government had instituted *civil* forfeiture proceedings, and there accordingly was no indication in the court's opinion that the possibility of an indictment was considered by either the court or the movant as a basis for a finding of irreparable injury. See 860 F.2d at 1003-1005 (discussing only civil remedies in the context of forfeiture proceedings, not a motion to suppress, as potentially adequate remedies at law that would preclude equitable relief under Rule 41(e)). The Tenth Circuit therefore had no occasion in any event to decide

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[6] Petitioner also cites (Pet. 5) *Mr. Lucky Messenger Service, Inc.* v. *United States*, 587 F.2d 15, 18 (7th Cir. 1978). But as petitioner acknowledges, that case stands for the quite different proposition that irreparable injury could be established if the movant showed that he needed the seized currency to satisfy a tax liability. In *Center Art Galleries-Hawaii, Inc.* v. *United States, supra*, also cited by petitioner (Pet. 6), the Ninth Circuit held that the good faith exception to the exclusionary rule applies to motions for return of property under Rule 41(e). 875 F.2d at 751-752. That holding obviously does not support petitioner's argument for equitable relief here.

whether the possibility of indictment would constitute irreparable harm.

Petitioner also asserts (Pet. 5) that the decision below conflicts with *Floyd* because the latter decision did not require a showing of "callous disregard" for Fourth Amendment rights as a condition for awarding relief. However, where, as here, the search was made in objective good faith pursuant to a warrant, *Floyd* agrees with the court below (Pet. App. A6) that equitable relief is unavailable. 860 F.2d at 1006. It is not clear to what extent, if any, the "callous disregard" formulation used by the Eighth Circuit imposes any further requirement. Moreover, petitioner ignores the fact that *Floyd* was decided in the context of civil proceedings, while this case arises in the context of a criminal investigation. If equitable relief were ever to be available to bar the use of illegally seized evidence by a grand jury in deciding whether to return an indictment, but see *United States* v. *Calandra*, 414 U.S. 388 (1974), such relief should be granted only in the most extraordinary circumstances. Accordingly, if the "callous disregard" formulation requires more than a showing of an absence of objective good faith, such a standard would not necessarily be inappropriate as a precondition to the relief petitioner seeks.

2. Petitioner also argues (Pet. 7-10) that the court of appeals erred in finding the warrant in this case to be valid. Contrary to petitioner's view, however, the court of appeals' decision does not rest on a finding that the warrant is valid. See Pet. App. A8 (court states that it "disposed of the case on procedural grounds," even though it "comment[s] on the district court's approach to the merits").[7]

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[7] In the course of its discussion of the procedural issue, the court of appeals did conclude that the federal agents who

Petitioner's objections are without merit in any event. Petitioner argues that its used oil and hazardous waste business constituted only a portion of its activities and that although fraud may have permeated that portion, it did not permeate the entire business. Accordingly, petitioner believes that the court of appeals erred in concluding that an "all records" search in these circumstances was constitutional. See Pet. 7-9. The court of appeals, however, noted that the search warrant did not generally seek records of all aspects of petitioner's business, but rather sought evidence dealing only with its used oil and hazardous waste business. Thus, the court stated: "The records dealing with [petitioner's] used oil and hazardous waste operations, *which was the limitation placed on the warrant*, were properly seized. Pet. App. A9 (emphasis added). See *id.* at A24-A29 (reproducing the warrant).[8] Respondent's affidavit, filed in support of the search warrant, shows that petitioner's used oil and hazardous waste operations were permeated with fraud, and therefore

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executed the warrant acted in objective good faith. Pet. App. A6. Particularly in view of the fact that one district judge and two court of appeals judges believed that the warrant was valid, this fact-bound holding does not warrant review. Petitioner does not address this *Leon* issue.

[8] Most of the paragraphs in the search warrant are restricted to items involving the used oil and hazardous waste business, or related activities. See paragraphs 1, 3, 4, 5, 6, 7, 8, 10, 12, 13. (Paragraph 13 contains a typographical error. In context, it plainly refers to companies set out in paragraph 12, which are involved in the used oil and hazardous waste business.) The remaining paragraphs in the warrant refer to materials that are not specifically related to the used oil and hazardous waste business, but might reasonably be expected to provide evidence regarding fraud in that business.

a relatively broad warrant seeking the records pertaining to those operations was entirely appropriate. The decisions of other courts of appeals that are cited by petitioner are not to the contrary.[9]

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[9] *United States* v. *Offices Known as 50 State Distribution, Co,*. 708 F.2d 1371 (9th Cir. 1983), cert. denied, 465 U.S. 1021 (1984), upheld a broad search warrant based on a showing that fraud permeated the business and that "[i]t was not possible through more particular description to segregate those business records that would be evidence of fraud from those that would not." 708 F.2d at 1374.

United States v. *Roche*, 614 F.2d 6 (1st Cir. 1980), upheld a district court determination that a search warrant was overbroad. The affidavit alleged fraud in the automobile insurance business, but the search warrant covered all records. The First Circuit held that the warrant was too broad because it was not limited to documents concerning the automobile insurance business. 614 F.2d at 7.

Voss v. *Bergsgaard*, 774 F.2d 402 (10th Cir. 1985), upheld a district court determination that search warrants were overbroad. The affidavit supporting the warrants showed probable cause to believe that the target had engaged in tax fraud, but the warrants themselves were not restricted to evidence relating to tax fraud. 774 F.2d at 404. The court cited *Roche* for the proposition that when a portion of a company's business is permeated with fraud, the search warrant should not go beyond that portion of the business. 774 F.2d at 406.

In *Center Art Galleries*, the affidavit showed evidence of fraud in the sale of forged Salvador Dali artwork. The warrant permitted seizure of virtually all materials on the premises, and "did not limit the warrants to items pertaining to the sale of Dali artwork despite the total absence of any evidence of criminal activity unrelated to Dali." 875 F.2d at 750. The district court (affirmed by the court of appeals) required the return of the materials seized, except for Dali artwork. 875 F.2d at 749.

Rickert v. *Sweeney*, 813 F.2d 907 (8th Cir. 1987), involved a warrant secured by the IRS for the seizure of all records

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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from a business. The warrant limited the search only by reference to the general conspiracy statute, 18 U.S.C. 371, and a provision of the tax code, both of which the court held were too broad to provide any limitation on the warrant's scope. The court also found no evidence that the company was permeated with fraud. The court found that probable cause existed to search for the records of one particular project, and it remanded for a determination of which items were properly seized. 813 F.2d at 909-910.

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